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In The

Supreme Court of the United States

October Term, 1990

REX A. SHARP, KERRY McQUEEN, and JAMES H. MORAIN, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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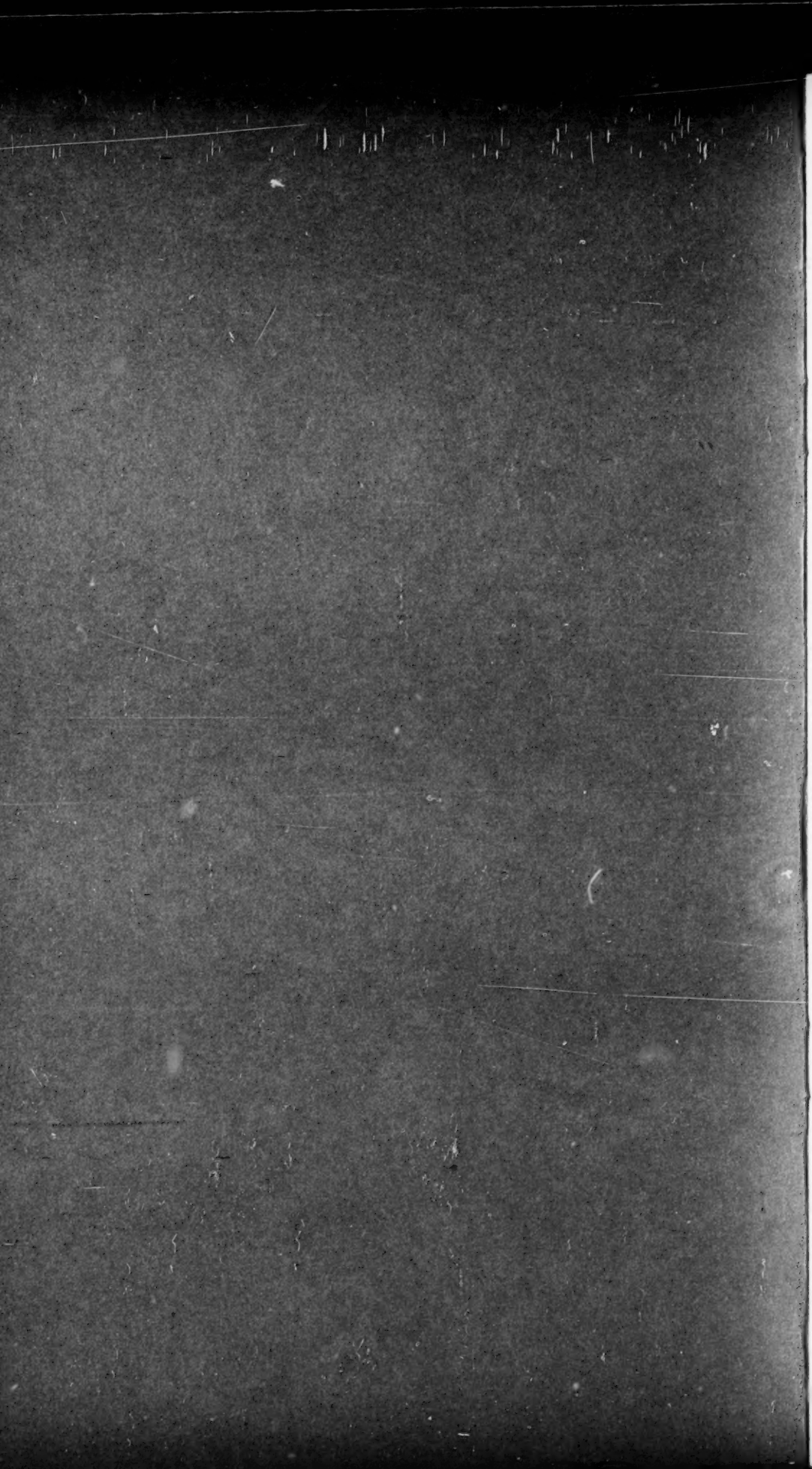

QUESTIONS PRESENTED FOR REVIEW

I. DID THE KANSAS SUPREME COURT ERR IN REFUSING TO CREATE NEW CAUSES OF ACTION FOR MONETARY DAMAGES?

II. DID THE KANSAS SUPREME COURT ERR IN REFUSING TO EXPAND THE APPLICATION OF 42 USC § 1994?

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT OF THE CASE

This appeal is from the second of Petitioners' three suits against the State of Kansas. Through these actions, Petitioners have sought monetary damages allegedly sustained as a result of the Indigent Defense Services Act, KSA 22-4501 et seq. (Weeks) as amended, its statutory precedent, and the rules and regulations promulgated pursuant to the Act. Petitioners are attorneys at law, as

well as a professional association of attorneys who were appointed by state district courts to represent indigent criminal defendants. They were compensated pursuant to the Act.

The origins of this case are found in the December 15, 1987 opinion of the Kansas Supreme Court in the case of *State ex rel Stephan v. Smith*, 242 Kan 336, 747 P 2d 816 (1987). In that case, Chief Justice Miller, writing for a unanimous court, reversed century old precedent and found that attorneys appointed to defend indigent criminal defendants do have a right to compensation. It was truly a landmark decision for the state. It recognized attorney services as property protected by the Constitution for the first time in Kansas. Petitioners had absolutely nothing to do with this change in the law.

Prior to *Smith* the state was not constitutionally obligated to pay any compensation to indigent criminal defense attorneys. However, a system had been established whereby local judges appointed attorneys to serve as counsel and those attorneys were compensated by the State Board of Indigent Defense Services. Petitioners' recital of the rates paid to such attorneys is correct, but incomplete. KAR 105-5-8 (2)(c) found in *Smith* at Kan 346 did allow the Board to provide compensation of up to $5,000 for exceptional cases. In addition, amounts over $5,000 could be paid " . . . if warranted by the extreme complexity of the case".

As to Petitioners' harsh statements concerning the Board, these are completely denied. The Board is composed of attorneys, legislators, and citizens who do their best to assure indigent defendants receive quality legal

representation within the budget approved by the legislature. It is true that in January of 1987 the Board's budget did suffer under a mid-fiscal year, state wide, budget cut. Court appointed counsel's billings were cut by 6%. Those hard times were necessitated by the fact that the state was broke. It is further true that the salaries of the full-time public defenders in Topeka, Wichita, and Junction City were not cut. Those salaries, which started under $25,000, were not reduced; instead, a hiring freeze was instituted and office operating budgets were also cut.

The Kansas Legislature meets from January to April each year. The state's fiscal year begins on July 1 and ends on June 30 of each year. The *Smith* decision did allow the state legislature the time needed to double the indigent defense system's budget, create a voluntary system of court appointments, and expansion of the public defender system.

On January 4, 1988, three weeks after the *Smith* decision, Petitioners filed their Class Action Complaint and Mandanus Proceeding against the State of Kansas in the United States District Court for the District of Kansas. This action was subsequently dismissed without prejudice on the basis of the 11th Amendment Immunity. The dismissal was recently upheld by the Tenth Circuit Court of Appeals. (*Sharp, et al v. State, et al.*, No. 88-1001-K (D.Kan March 16, 1988), affirmed, *Sharp, et al. v. State*, No. 88-1553 (10th Cir., May 7, 1990).)

On March 16, 1988, Petitioners filed a Class Action Petition against the State of Kansas in the State District Court of Seward County, Kansas. Summary judgment was entered in favor of Kansas. The primary basis of the

state's argument was that the plaintiffs were suing the wrong defendant under numerous theories of law which either did not exist, or did not apply to the State of Kansas. (*Sharp, et al. v. State*, Seward County Case No. 88-C-33.)

On December 8, 1989, the Kansas Supreme Court affirmed the district court's judgment. Chief Justice Miller, again writing for a unanimous court, found that Petitioners had not stated a cause of action in the district court. Further, the court would not allow Petitioners to raise their express inverse condemnation theory for the first time at the appellate level. (*Sharp v. State*, 245 Kan. 749, 783 P.2d 343 (1989), rehearing denied March 14, 1990.)

On January 18, 1990, Petitioners again filed a Class Action Petition against the State of Kansas, in the District Court of Seward County, Kansas. Petitioners, in this action, seek monetary damages under a Fifth Amendment inverse condemnation theory, as well as a state claim of unjust enrichment. (*Sharp, et al. v. State*, Seward County Case No. 90-C-14.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE KANSAS SUPREME COURT DID NOT CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT, ANY UNITED STATES COURT OF APPEALS, OR THE UNITED STATES SUPREME COURT.

A. THE KANSAS SUPREME COURT DID NOT ERR IN REFUSING TO CREATE NEW CAUSES OF ACTION FOR MONETARY DAMAGES.

Petitioners' position in this matter is that, if they were wronged, there must be a monetary remedy. Injunctive remedies are insufficient.

The Respondent's position is best stated in the *Sharp*, supra, opinion at Kan. 754-755, where the Kansas Supreme Court held:

> In *Smith*, we found that the inequities under the old system of appointment and limited remuneration had reached such a point as to offend constitutional rights. We directed that the system be changed within a very short period of time, and the change has occurred. We have found no case, and none has been cited, which mandates the award of monetary damages in such a case in addition to equitable relief.

Petitioners could have sued any number of state officials for their monetary remedy under 42 USC § 1983. But, of course, such suits would have been blocked by the doctrine of qualified immunity. *Harlow v. Fitzgerald*, 457 US 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982); *Mitchell v. Forsyth*, 472 US 511, 526, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985). Thus, they chose to sue the state directly under 42 USC § 1983 and § 1985(3). Further, they attempted a "Bivens" action against the State of Kansas, and sought relief under 42 USC § 1994, as well as a state cause of action. At the appellate court level, they attempted to add a new theory, "express inverse condemnation".

As to the 42 USC § 1983 and § 1985(3) claims, these have been dropped by Petitioners. The basis of this abandonment was *Will v. Michigan Department of State Police*, ___ US ___, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989).

As to the "Bivens" action, Petitioners at the state, district, and appellate court levels maintained that even if they could not sue the Respondent State of Kansas pursuant to 42 USC § 1983, 42 USC § 1985(3), 42 USC § 1994, or under a state theory of unjust enrichment, that it was

essential that they be able to bring a "Bivens" action against the state. This theory was based on a belief that there is an implied cause of action based solely on alleged constitutional violations.

There is no direct cause of action based solely upon the amendments to the Constitution when said action is brought against state defendants. Petitioners have failed to procure any precedent establishing such a cause of action.

The federal courts have long been faced with causes of action based solely upon the Constitution. With the limited exception of "Bivens" actions, the federal courts have not allowed such cases to be prosecuted. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971). *Bivens* actions are not allowed against state and local officials or their units of government. *Berrios v. Agosto*, 716 F.2d 85, 89 (1st Cir. 1983).

> Constitutionally implied causes of action have been found to be unavailable to plaintiffs seeking to hold state and local officials liable for their unconstitutional conduct under the color of state law. The lower courts have uniformly held that where plaintiffs have the statutory remedy of 42 USC § 1983 available to them, implied causes of action under the *Bivens* doctrine are precluded . . . In *Berrios v. Agosto*, the Court of Appeals for the First Circuit expressly held that a plaintiff whose section 1983 action was barred by the doctrine of absolute legislative immunity could not circumvent the limitations of section 1983 by bringing suit under the doctrine of *Bivens*.

Cook & Sobieski, Jr., *Civil Rights Action*, at 14-32 and 14-33 (1987).

The federal district court of Kansas, as well as the Tenth Circuit Court of Appeals, have followed the nation and do not allow *Bivens* actions against the State or its employees. *Vakas v. Rodriguez*, 728 F. 2d 1293 (10th Cir. 1984); *Lee v. McManus*, 589 F.Supp. 633 (D. Kan. 1984).

Constitutional amendments do not create a cause of action *ex proprio vigore*. Plaintiffs' cause of action based on these amendments alone, without statutory support, failed to state a claim upon which relief could be granted.

As to Petitioners' "express inverse condemnation" theory, this was raised by Petitioners for the first time in their brief to the Kansas Supreme Court. Petitioners did not raise this theory in their district court pleading. They did not raise this theory in their written opposition to the Respondent's district court motion to dismiss. (Petitioners incorrectly states that defendants filed a motion for judgment on the pleadings in district court.) They did not raise this theory in their oral argument against Respondent's district court motion. They did not even raise the issue in their Docketing Statement to the Kansas Appellate Courts which requires they identify their legal theories. It was not until they filed their brief with the state appellate court that Petitioners either advanced the theory of express inverse condemnation or cited the precedent upon which they rely to advance the theory.

In Kansas, a legal theory cannot be asserted for the first time on appeal. The Kansas Supreme Court held in *Landrum v. Taylor*, 217 Kan. 113, 120, 535 P.2d 406 (1975), "Where it does not affirmatively appear that a question raised on appeal was presented for determination by the trial court, this court does not consider it on review". See also *Fleming v. Etherington*, 227 Kan. 795, syl. ¶ 7, 610 P.2d 592 (1980); *Swanston v. Cuna Mutual Ins. Society*, 7 Kan. App. 2d 28, 31, 636 P.2d 1368 (1981).

The Court should not hear Petitioners' express inverse condemnation arguments. They have not perfected their 28 USC § 1257 jurisdiction on this issue. The Court should continue its long-settled rule of jurisdiction and not consider an issue which was not adequately presented in the state system. *Webb v. Webb*, 451 US 493, 496-497, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981).

Even if Petitioners could present their new theory, it would not justify the reversal of the Kansas Supreme Court. This case does not present an inverse condemnation question, express or otherwise.

In order to present a 5th Amendment inverse condemnation question, Petitioners would have to allege a complete "taking" which could not be addressed by a state procedure. *First Lutheran Church v. Los Angeles County*, 482 US 304, 311, 312 n.6, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987). Petitioners' district court petition does not allege a complete "taking", only inadequate compensation. At best, Petitioners plead that they had suffered a diminution in the value of their property. (Petition, ¶¶ 14 and 16, Petitioners' App. 4d, 4e.)

If the Court were to adopt Petitioners' theory, which is based on land use regulations of real property, then it must consider that allegations of this nature, standing alone, do not state a 5th Amendment "taking". In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978) the Court held:

> Appellants concede that the decisions sustaining other land-use regulations, which like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' . . .

Further exhaustion of state administrative remedies is necessary before a "taking" can be said to have occurred. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-195, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985). Petitioners never alleged that they had appealed the determination of compensation by a district court judge, or the State Board of Indigent's Defense Services, or that a state law inverse condemnation proceeding was inadequate. These are prequisite conditions to maintaining a constitutional action under the *First Lutheran Church* rationale. Even then a recognized cause of action would be required, such as 42 U.S.C. 1983, *Williamson, supra*, at U.S. 182, or a government condemnation action, *Kirby Forrest Industries Inc. v. United States*, 467 U.S. 1, 3, 81 L.Ed.2d 1, 104 S.Ct. 2187 (1984) or a recognized state law cause of action, *First Lutheran Church, supra*, at U.S. 308. Petitioners have met none of these requirements.

Finally, Petitioners have not met the conditions precedent for the filing of a state inverse condemnation action. The Kansas Supreme Court has held:

> Inverse condemnation actions are in the nature of a suit on implied contract. When a public entity appropriates and uses property or rights therein, without compensating the owner, an implied contractual obligation arises to pay the owner reasonable value of the property or rights taken without compensation.

Ventures in Property I v. City of Wichita, 225 Kan. 698, 705-706, 594 P. 2d 671 (1979).

Claims against the State of Kansas based on implied contracts must utilize the procedures provided in K.S.A. 46-903 and 46-907. Petitioners have failed to utilize said procedures. They did not present their claim to the Joint Committee on Special Claims prior to the filing of this action. That is a condition precedent which cannot be ignored. *Wheat v. Finney*, 230 Kan. 217, 630 P.2d 1160 (1981).

Petitioners should not be allowed to raise the issue of express inverse condemnation. Even if they could, it would not be grounds for the reversal of the Kansas Supreme Court.

B. THE KANSAS SUPREME COURT DID NOT ERR IN REFUSING TO EXPAND THE APPLICATION OF 42 USC § 1994.

In the case of *State, ex rel. Stephan v. Smith*, supra, at Kan. 378, the Kansas Supreme Court specifically addressed the Thirteenth Amendment issue raised by Petitioners. The Kansas Court held that, without imprisonment, there was no violation of the Thirteenth Amendment. Other courts, some of which were cited in the Kansas opinion, have, in addition, held there was no

Thirteenth Amendment violation for imposing upon the private Bar a duty to represent indigent defendants. See *Williamson v. Vardeman*, 674 F.2d 1211, 1214 (8th Cir. 1982).

42 USC § 1994 was created in order to enforce the Thirteenth Amendment. *U.S. v. Reynolds*, 235 U.S. 133, 143, 59 L.Ed. 162, 35 S.Ct. 86 (1914). Without a Thirteenth Amendment violation, there can be no 42 USC § 1994 violation.

The New Jersey Supreme Court in *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966), considered the issue of 42 USC § 1994, and found it not to apply to attorneys who were required to serve in indigent defense systems. There is no precedent in the nation sustaining a 42 USC § 1994 violation in cases such as the Petitioners.

Petitioners' primary objection to the Kansas Supreme Court's ruling is based on the case of *United States v. Kozminski*, 487 U.S. ___, 101 L.Ed.2d 788, 108 S.Ct. 2751 (1988). This case involved two mentally retarded, aged, farm workers who were forced to labor seven days a week, seventeen hours a day, for no pay. These unfortunates were isolated from their families, threatened with institutionalization, and held on the farm by physical and psychological force. To compare these individuals with the Petitioners is ridiculous. To promote the idea that the *Kozminski* case would serve to overturn *State, ex rel. Stephan v. Smith* is wrong.

In *Kozminski* the Court specifically recognized that the state may compel its citizens to perform civil dues. Id. at .L.Ed.2d 805. No court, federal or state, has ever accepted Petitioners' slavery theory. It should not be

adopted now. The reasoning of the Kansas Supreme Court was sound and it should be upheld.

CONCLUSION

The Respondent respectfully submits that the Writ of Certiorari prayed for in this action be denied for the following reasons: (1) The Kansas Supreme Court's decision did not conflict with any other state court of last resort, or any United States Court of Appeal, or this Court; (2) The Kansas Supreme Court did not err in refusing to create new causes of action for monetary damages; (3) The Kansas Supreme Court did not err in refusing to expand the application of 42 USC § 1994.

Respectfully submitted,

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